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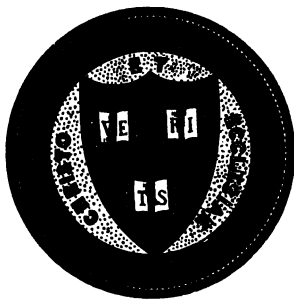
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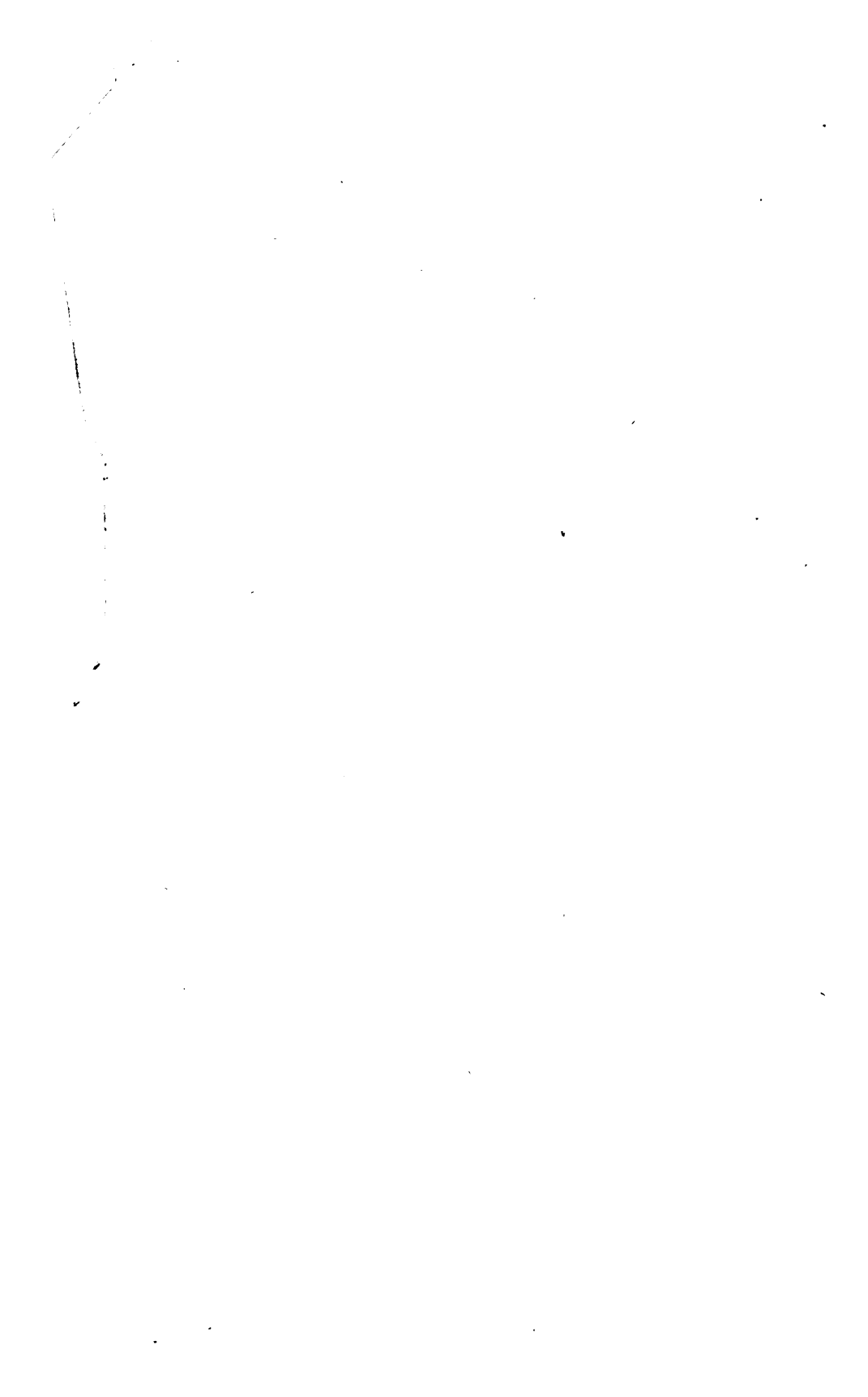
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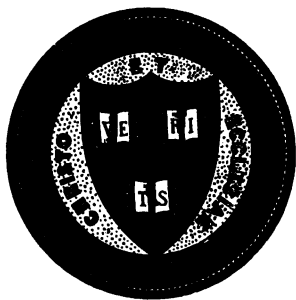
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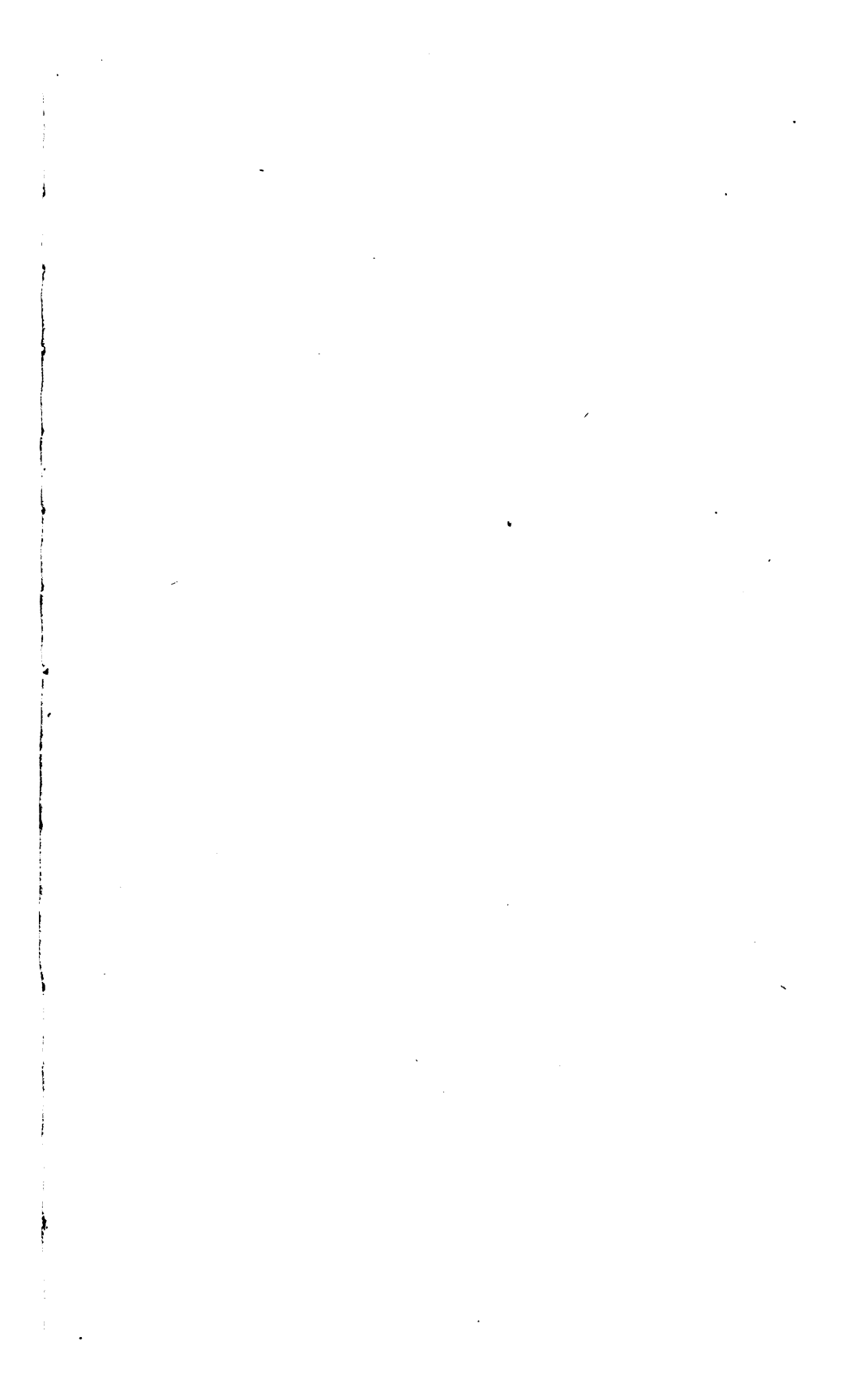
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OPINION
OF
THE ATTORNEY GENERAL
CONCERNING THE
JUDICIAL AUTHORITY
OF THE
COMMISSIONER OR MINISTER AND OF CONSULS OF THE UNITED STATES
IN
CHINA AND TURKEY.

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OPINION OF THE ATTORNEY GENERAL

CONCERNING

THE JUDICIAL POWERS OF THE COMMISSIONER OR MINISTER AND OF CONSULS
OF THE UNITED STATES IN TURKEY AND CHINA.

DEPARTMENT OF STATE,
October 8, 1855.

The following opinion of the Attorney General, on the judicial authority of the commissioner or minister and of consuls of the United States in China and Turkey, is published for their instruction:

ATTORNEY GENERAL'S OFFICE,
September 19, 1855.

SIR: Your communication of the 13th of June calls for my opinion as to certain points in the judicial jurisdiction of the commissioner and consuls of the United States in China. My reply has been delayed for the purpose of conference with Mr. McLane, the late, and Mr. Parker, the present, commissioner. I now proceed to state the conclusions to which reflection has brought me.

That jurisdiction, so far as regards the forms and the manner of its exercise, is regulated by the act of August 11, 1848, which purports to have for its object to carry into effect certain provisions, in this relation, contained in the respective treaties between the United States and China, and the United States and the Ottoman Porte. (ix Stat. at Large, p. 276.)

This act, consisting of twenty-four sections, is, of course, to be considered as a whole; and anything

obscure in one part of it is to be elucidated by reference to other parts.

It is, avowedly, based on the two treaties in question, and especially that with China, and is to be construed in subordination to that, and to the constitution.

In substance, it accepts and gives actual form to those stipulations of treaty, which confer on all citizens of the United States the rights of extritoriality in China and Turkey.

The legal rationale of the treaty stipulations as to China, with which we are now chiefly concerned, and their relation to the legislative authority of the United States, are explained in the following despatch of the minister who negotiated the treaty :

“ I entered China with the formed *general* conviction that the United States ought not to concede to any foreign state, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations,—in a word, a Christian state.

“ The states of Christendom are bound together by treaties, which confer mutual rights and prescribe reciprocal obligations. They acknowledge the authority of certain maxims and usages, received among them by common consent, and called the law of nations ; but which, not being fully acknowledged and observed by the Mohammedan or Pagan states, which occupy the greater part of the globe, is, *in fact*, only the international law of Christendom. Above all, the states of Christendom have a common origin, a common religion, a common intellectuality ; associated by which common ties, each permits to the subjects of the other, in time of peace, ample means of access to its dominions for the purpose of trade, full right to reside therein, to transmit letters by its mails, to travel in its interior at pleasure, using the highways, canals, stagecoaches, steam-

boats, and railroads of the country as freely as the native inhabitants. And they hold a regular and systematic intercourse as governments, by means of diplomatic agents of each, residing in the courts of the others, respectively. All these facts impart to the states of Christendom many of the qualities of one confederated republic.

“How different is the condition of things out of the limits of Christendom! From the greater part of Asia and Africa, individual Christians are utterly excluded, either by the sanguinary barbarism of the inhabitants, or by their phrensied bigotry, or by the narrow-minded policy of their governments. To their courts, the ministers of Christian governments have no means of access except by force, and at the head of fleets and armies. As between them and us, there is no community of ideas, no common law of nations, no interchange of good offices; and it is only during the present generation, that treaties, most of them imposed by force of arms or by terror, have begun to bring down the great Mohammedan and Pagan governments into a state of inchoate peaceful association with Christendom.

“To none of the governments of this character, as it seemed to me, was it safe to commit the lives and liberties of citizens of the United States.

“In our treaties with the Barbary states, with Turkey, and with Muscat, I had the precedent of the assertion, on our part, of more or less of exclusion of the local jurisdiction, in conformity with the usage, as it is expressed in one of them, observed in regard to the subjects of other Christian states.

“Mr. Urquhart thinks these concessions have not been wise on the part of the Mohammedan states. It may be so for them; but it will be time enough for them to obtain jurisdiction over Christian foreigners, when these last can visit Mecca, Damascus, or Fez, as safely and freely as they do Rome and Paris, and when submission to the local jurisdiction becomes reciprocal.

“Owing to the close association of the nations of Christ-

edom, and the right their people mutually enjoy and exercise, of free entry into each other's country, there is reciprocity in the recognition of the local jurisdiction. Not so in the case of the great Moslem or Pagan states of Asia and Africa, whose subjects do not generally frequent Europe and America, either for trade, instruction, or friendship.

"In China, I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the empire; while the Portuguese attained the same object through their own local jurisdiction at Macao. * *

"I deemed it, therefore, my duty, for all the reasons assigned, to assert a similar exemption on behalf of citizens of the United States. This exemption is agreed to in terms by the letter of the treaty of Wang-Hiya. And it was fully admitted by the Chinese, in the correspondence, which occurred contemporaneously with the negotiation of the treaty, on occasion of the death of Sha Aman.

"By that treaty, thus construed, the laws of the Union follow its citizens, and its banner protects them, even within the domain of the Chinese empire.

"The treaties of the United States with the Barbary powers, and with Muscat, confer judicial functions on our consuls in those countries, and the treaty with Turkey places the same authority in the hands of the minister or consul, as the substitute for the local jurisdiction, which, in each case of controversy, would control it if it arose in Europe or America. These treaties are in this respect accordant with general usage, and with what I conceive to be the principles of the law of nations in relation to the non-christian powers.

"In extending these principles to our intercourse with China, seeing that I have obtained the concession of absolute and unqualified extraterritoriality, I considered it well to use in the treaty terms of such generality, in describing the substitute-jurisdiction, as, while they hold unimpaired the customary or law-of-nations-jurisdiction, do also leave to Congress the full and complete direction to define, if it

please to do so, what officers, with what powers, and in what form of law, shall be the instruments for the protection and regulation of the citizens of the United States.

“ And it only remains, in case the treaty shall be ratified, to adopt such legislative provisions as the wisdom of the President and of Congress may desire or approve, to give effect to the concessions, which the Chinese government has made in this matter, and which seem to me so important in principle, and so material to the honor and interests of the United States.” (Mr. Cushing to Mr. Calhoun, September 29, 1844. MS., State Dept.)

This anticipated dependence of the act on the treaty is plainly expressed by it, in so far as regards the *civil* jurisdiction of the commissioner and consuls, when it says: “ Which jurisdiction shall embrace all controversies between citizens of the United States or others provided for by said treaty.” (Sec. 3d.) And in the text of the act, as well as its title, it purports “to carry into effect” or into “full effect” the provisions of the treaty.

The *criminal* jurisdiction conferred by the act is general in terms, without, however, as we shall see hereafter, overstepping the treaty. Whether the civil jurisdiction is *broad*er than that of the treaty, is to be decided by its enactments. I do not perceive any provision of the act, in this respect, which goes beyond the treaty. Any provision, to have such effect, must be affirmative and reasonably explicit; because the tribunals, constituted by the act as well as the treaty, are special ones, having limited jurisdiction, namely, that which is conferred by treaty or statute. I repeat, that nothing appears, in the course of the act, capable of imparting jurisdiction beyond the persons and predicaments provided for by the treaty stipulations.

Hence, incontestably, in exploring the intent of the statute, we must be careful at no time to lose sight of the provisions of the treaty, at least in the questions of jurisdiction.

Let us now trace, through the treaty and statute, the persons who are to exercise this jurisdiction, the forms of its exercise, the laws it is to administer, and the persons and the conditions of its application.

“For the superintendence and regulation of the concerns of the citizens of the United States doing business at the said five ports” (of China), says the treaty, “the government of the United States may appoint consuls, or other officers, at the same, who shall be duly recognised as such by the officers of the Chinese government.” (Art. iv.)

After which it proceeds:

“All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction, and regulated by *the authorities*, of their own government. And all controversies occurring in China between citizens of the United States and the subjects of any other government, shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China.” (Art. xxv.)

“And if controversies arise between citizens of the United States and subjects of China, which cannot be amicably settled otherwise, the same shall be examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction.” (Art. xxiv.)

Finally, in regard to crimes, it is agreed that—

“Citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul, or other public functionary of the United States, thereto authorized according to the laws of the United States.” (Art. xxi.—See viii Stat. at Large, pp. 592, 597.)

On attentive consideration of the provisions, it will be seen that they confer on citizens of the United States in China unqualified and absolute extritoriality in all *criminal* matters; and that the sole jurisdiction of the United States over its citizens in China is plainly perfect in terms, except in the following cases:

1. Where, in a matter of civil right, it involves controversy between a Chinese and an American, then the authorities of the two governments are to have *concerted* action.

2. Where it involves controversy between an American and some person other than Chinese, as English or French, for example, then its adjustment is to be regulated by the international relations of the United States, and of Great Britain or France.

3. Whether any of the provisions quoted apply to a case of civil right in which some *government* is a party, on the one side, and a citizen of the United States on the other, is a question to be considered more particularly in the sequel.

In our treaty with the Ottoman Porte, the stipulations of extritoriality are less explicit. In *terms*, it seems to be imperfect; but, interjecting into each stipulation its true construction, it will be seen that, so far as they go, they accomplish the object as follows:

“If litigations and disputes arise between the subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard nor shall judgment be pronounced unless the American dragoman be present. Causes (between subjects of the Porte and citizens of the United States) in which the sum (in controversy) may exceed five hundred piastres, shall be submitted to the Sublime Porte, to be decided according to the laws of equity and justice. Citizens

of the United States of America, quietly pursuing their commerce, (or other affairs in the Turkish empire, including the countries subject to its suzerainty), and not being charged or convicted of any crime or offence, shall not be molested (either by acts of violence, or by any claim or pretence of local jurisdiction); and even when they may have committed some offence, they shall not be arrested or put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offence, following, in this respect, the usage observed towards other Franks, (that is, tried and punished by the authorities and the laws of the United States):” (Art. xxi, viii Stat. at Large, p. 409.)

In order to execute these treaties,—to carry the laws of the United States into Turkey and China,—to have our territorial jurisdiction follow our people and our flag into those empires,—persons clothed with lawful authority are the necessary instruments. In the treaty with Turkey they are spoken of as the “minister or consul” of the United States; in that with China, as “consuls or other officers,” “public officers,” the “consul or other public functionary,” and “the authorities,” of the United States. Then comes in the statute, which provides for the exercise of judicial power over the citizens of the United States in the cases which it defines, by “the commissioner and consuls of the United States duly appointed to reside in China,” (sec. 1); and by “the minister of the United States and the consuls appointed by the United States to reside” in Turkey, (sec. 22): it being provided that the term “commissioner,” like that of “minister,” is intended for “the person vested with the powers of chief diplomatic functionary of the United States,” and the term “consul” for “any person vested by the United States with,

and exercising, the consular authority," in Turkey or China.

It is observable that the statute provides in terms for the exercise of judicial powers by the ministers and consuls in Turkey only "so far as regards the punishment of crime." (sec. 22). I think this is a defect, if not oversight, in the act. It leaves all questions of civil jurisdiction to the vagueness of the general analogies of public law as applied to Franks in the Levant. What is to follow, therefore, is only in part applicable to Turkey, and will be stated mainly as affecting China. (Mr. Toucey's Opinion, Jan. 31, 1849, ed. 1851, p. 2136.

In thus retaining jurisdiction of our citizens in China, and providing persons to exercise it, we could not rely upon the law of nations exclusively, nor upon usages, or a customary local code applicable to the emergency, such as exists in the Levant. Accordingly, the statute contains the following important provision:

"That such jurisdiction in criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute said treaty, extended over all citizens of the United States in China, (and over all others to the extent that the terms of the treaty justify or require), so far as such laws are suitable to carry said treaty into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law shall be extended in like manner over such citizens and others in China; and if defects still remain to be supplied, and neither the common law nor the statutes of the United States furnish appropriate and suitable remedies, the commissioner shall, by decrees and regulations, which shall have the force of law, supply such defects and deficiencies."

The system of law is composed, therefore, of—

1. The laws of the United States, comprehending the constitution, treaties, acts of Congress, equity and admiralty law, and the law of nations, public and private, as administered by the Supreme Court, and circuit and district courts of the United States, and, in certain cases, regulations of the Executive Departments.

2. "The common law." In this respect, the statute furnishes a code of laws for the great mass of civil or municipal duties, rights, and relations of men, such as, within the United States, are of the resort of the courts of the several States.

Some general code in these respects became necessary, because the law of the United States,—that is, the federal legislation,—does not include these matters, and, of itself, would be of no avail towards determining any of the questions of property, succession, contract, which constitute the staple matter of ordinary life.

For such of the States as were founded in whole or chief part by colonists from Great Britain and Ireland, or their descendants, the law of England, as it existed in each of those States at the time of their separation from Great Britain, with such modifications as that law had undergone by the operation of colonial adjudication, legislation, or usage, became the common law of such independent State.

Meantime, in addition to many changes, differing among themselves, which the common law underwent in each of the colonies before it became a State, that common law has been yet more largely changed by the legislation and judicial construction of each of the States.

Hence, it was not enough to enact that the common

law should intervene to supply, in China, deficiencies in the law of the United States. For the question would be sure to arise: What common law? The common law of England at the time when the British colonies were transmuted into independent republican States? Or the common law of Massachusetts? Or that of New York, or Pennsylvania, or Virginia? For all these are distinct, and in many important respects diverse, "common law."

To dispose of this difficulty, the statute went one step further, and enacted, that—

3. "Decrees and regulations" may be made from time to time by the commissioner, which shall have the force of law, and supply any defects or deficiencies in the common law and the laws of the United States.

This power of supplementary decree or regulation serves to provide for many cases of criminality, which neither federal statutes nor the common law would cover.

In addition to which, it is enacted that the commissioner, with advice of the several consuls, shall prescribe the forms of processes to be issued, the mode of executing the same, the form of oaths, the costs and fees to be allowed and paid; and generally to make all such decrees, regulations, and orders, under the act, as the exigency may demand, which shall be "binding and obligatory until annulled or modified by Congress." (Sec. 5.)

In certain respects, therefore, the commissioner *legislates* for citizens of the United States in China; it being required, meanwhile, that such "regulations, orders, and decrees," as he may make in the premises, shall be transmitted "to the President, to be laid before Congress for its revision." (Sec. 6.)

The statute then proceeds to describe in detail the manner in which the commissioner and the consuls are to administer law in China.

First, it is enacted that said "public functionaries" are empowered "to arraign and try," in a certain manner, all citizens of the United States "charged with offences against law" which shall be committed in China, and upon conviction, to sentence such offenders, and to issue, "each of them," such processes as are necessary to carry this authority into execution; and, secondly, that, in regard to civil rights, whether of person or property, said functionaries are "vested with all the judicial authority necessary to execute the provisions of the said treaty." (Sec. 2 and 3.)

In regard to criminal matters, each consul, within the limits of his consular circumscription, is empowered, upon personal knowledge, belief, complaint, or information in writing, to cause the arrest of any citizen of the United States charged with the commission of crime in China, to try the offender, and to punish, by fine or imprisonment, under the following conditions:

In all cases where the fine does not exceed one hundred dollars, or the imprisonment sixty days, the consul may, if he see fit, hear and decide alone, and by his own mere authority. (Sec. 7, 8.)

In all cases where the fine is more than one hundred dollars, but not more than five hundred, or the imprisonment more than sixty days, but not more than ninety, the consul may hear and decide alone, but subject to an appeal to the commissioner. (Sec. 9.)

In all the foregoing cases, if the consul see fit, and in all cases of higher punishment, of necessity, he will summon one or more citizens of the United States, not

exceeding four, to sit with him in the trial. Each of such assessors shall enter and sign of record his opinion in the case, which, however, shall be decided still by the consul. If he and his assessors concur in opinion, the decision is final; but if they differ, the case, with the record and all the evidence, shall be referred to the commissioner, who may either determine it, or, if he choose, remit the case with instructions to the consul for further proceedings. (Sec. 10.)

In capital cases, which, as enumerated by the act, are "murder, insurrection, or rebellion against the Chinese government with intent to subvert the same," the provision is, that the consul must always proceed with four assessors; he and they must all concur in opinion to produce conviction, and the conviction is invalid unless approved by the commissioner; who, if he approve it, is either to issue a warrant of execution, or postpone the same, or, in his discretion, submit the case to the President of the United States for pardon. (Sec. 15, 16.)

In regard to civil matters, the provision is, that, in "all civil cases under said treaty," the consuls have jurisdiction, each within his consular circumscription, to try of himself, and decide finally, any controversy where the damage demanded does not exceed five hundred dollars. If it exceed five hundred dollars, then of necessity, and in other cases if the consul see fit, he is to summon to his aid not less than two, nor more than three, citizens of the United States as assessors, who shall with him hear the case. If the associates concur in opinion with the consul, his decision is final; but if they differ with him, their opinions are to be noted on the record, and either party may appeal from his decision to the commissioner. (Sec. 11.)

The commissioner is fully authorized to hear and decide all cases, which lawfully reach him under the provisions of the act, and "to decide finally any case upon the evidence which comes up with it, or to hear the parties further, if he thinks justice will be promoted thereby; and he is empowered to prescribe rules upon which new trials may be granted, either by the consuls or by himself, if asked for upon justifiable grounds" (Sec. 13.)

Although it is nowhere said by the statute, in so many words, that the judicial authority of the commissioner in the trial of the above described cases, civil or criminal, is appellate only, yet such appears to me to be its true legal intendment. No original jurisdiction in these two classes of cases is given to him in express terms by the statute. It is all conferred in express terms on the consuls. In capital cases, it is plainly enacted that the consul and his assistants convict, and the "commissioner approves the conviction," the previous conviction being essential, and approval or disapproval being in the nature of things a separate act. In all other criminal cases, and in all the civil cases mentioned, the matter comes to the commissioner by appeal, or by certificate of difference of opinion between the consul and his assessors; and the commissioner decides upon the evidence "which comes up," that is, from the consul, or upon further hearing of the parties, as he shall determine. All these are the incidents and the *indicia* of appellate, as distinguished from original, jurisdiction.

Moreover, it seems fitting, and in the analogy of other judicial proceedings, that, in ordinary matters, an appellate authority should exist: which would not

be the case here, if the commissioner had, in all things, original jurisdiction, concurrent with that of the consuls; and this anomaly would be the greater in the matter, in consideration that the statute gives no assessors to the commissioner.

I think it is the theory of the statute, and a good one, to give to the commissioner, in ordinary judicial matters, at common law, only a regulative, appellate, and superintending authority, devolving the original jurisdiction in such cases upon the resident consuls; that condition of things being altogether in harmony with their diplomatic relation to one another and to the government. (Mr. Marshall to Mr. Marcy, Dec. 8, 1853, Ex. Doc. 33d Cong., 1st ses., no. 123, p. 334.)

No apparent inconvenience attaches to this conclusion, except in the contingency of the temporary vacancy of a consulate. I think in such case the commissioner ought to have, if he has not already, authority to appoint an acting consul. (Ibid. p., 372.)

But the criminal and civil cases, which have thus far been the subject of consideration, do by no means cover the field of judicial authority at common law, still less that of such authority under the laws of the United States, still less of that which may be comprehended by regulations adopted by the commissioner, or by the commissioner and the consuls, and having "the force of law," to supply any defects or deficiencies in the common law and the laws of the United States. It is manifest that the terms of description, contained in the statute, embrace all possible jurisprudence, which does or may exist, compatibly with the organic principles of constitutional law, which govern, and at the same time guard, the rights and the duties of citizens of the United States.

Leaving out of consideration all criminal matters, that is, treating them as fully disposed of, it becomes material to inquire how matters, not criminal, and not included in the appealable civil cases, are to be dealt with as between the commissioner and the consuls.

The statute-provision as to the trial of civil "cases" is, that "the consuls aforesaid, and each of them, at the port for which he is appointed, shall have jurisdiction, as is herein provided, in all civil cases arising under said treaty, wherein *the damage demanded* does not exceed five hundred dollars," in which cases the consular decision may be final; "but if in his judgment any case involves legal proplexities, and assistance will be useful, or if *the damage demanded* exceeds five hundred dollars," then he must have assessors, and his decision is subject, in case of difference of opinion, to an appeal to the commissioner. (Sec. 11.)

Now, there are processes which do not involve any question of "damages" whatever, but which are nevertheless of primary importance and utility; such as the writ of *habeas corpus*.

Other cases of controversy at law exist, which concern property, but in which no question of mere damage is involved, unless incidentally, such as many suits *in rem*, and many others *de re*.

There is another class of cases of property, in which no damages are demanded, but equitable relief only, such as most matters in chancery.

There is another class of processes, which have for their object to enforce or to protect rights in cases already *sub judice* otherwise; such as writs of mandamus, supersedeas, and prohibition.

Finally, there is a vast body of justiciable rights, to

which the phrase of "damages demanded" can by no possibility apply, being questions of personal right, of the domestic relations, of inheritance, or of testamentary disposition. This includes cases of copartnership, or other joint interest, in real or personal estate, of insolvency, of divorce, of alimony, of wills, and of intestate successions.

As to the distribution of all these matters between the commissioner and the consuls, the statute is absolutely silent; and that distribution is to be made by regulation, in subordination always to other specific rules of law.

Therefore it is, that, in several provisions of the statute, jurisdiction is conferred in general terms on both the commissioner and the consuls, (sec. 1, 2, 3); and that a general power to issue all needful processes, as well as to make regulation of all processes, is conferred on the commissioner. (Sec. 5 and 13.) These general powers, we have seen, are defined and limited as to *certain* "civil cases" in other parts of the statute, which limitation depends on the nature of the case, as indicated by the question of "damages."

The same general powers are also limited more or less in the sense of locality; for it is enacted that "the said functionaries," that is, the commissioner and the consuls, being "(in)vested with all the judicial authority necessary to execute the provisions" of the treaty "shall entertain jurisdiction in matters of *contract* at the port where, or nearest to which, the contract was made, or at which, or nearest to which, it was to be executed; and in all other matters, at the port where, or nearest to which, the cause of controversy arose, or at the port where, or nearest to which, the damage

complained of was sustained,—any such port above named being always one of the five mentioned in the treaty.” (Sec. 3.)

These conditions of locality are to be applied, so far as they may be in their nature applicable, to all cases. To many cases of contract and of damage sustained, the condition of one of the five ports is inapplicable by its very nature. Thus, it may be the case of a contract made and to be executed, or of damage sustained, in Europe or in America, the parties being *now* in China.

And the condition does not apply in terms to any thing but matters of “contract” or “damage sustained.” What shall be said, if it be a question of probate of will, of intestacy, or of divorce?

Nor does the other form of the condition,—“the port where, or nearest to which, the cause of controversy arose,”—satisfy all the *desiderata* of the subject. There may be no “controversy” or “cause of controversy” in the matter, though it requires judicial determination, as the probate of a will, which is at once the source and the authentication of title. And in many matters of “controversy,” it may be difficult, if not impossible, to show where the “*cause* of controversy” arose.

But the statute does not undertake or profess to provide specially for all questions, leaving many to the regulations of the commissioner.

Where the question of place of judgment is determined by the statute, of course that controls the commissioner as well as the consuls. In all other cases, the rules and analogies of law on the subject of jurisdiction, having reference to the *situs* of the thing, or

the residence or commorancy of parties, afford a sufficient guide to the regulative discretion of the commissioner.

Whatever is determined as to the *person* who shall exercise jurisdiction, must of course be conciliated with what shall be determined as to the *place* of jurisdiction.

Independently of this, it seems to me that the commissioner and the consuls should make provision, in the manner indicated by the statute, that is, by separate or by joint regulations, (sec. 4 and 5), concerning all those things, the jurisdiction of which it leaves indeterminate, and, therefore, subject to regulation.

Matters of insolvency, intestacy, probate of will, divorce, division, or regulation of copartnership or other common interests, habeas corpus, specific performance, trust, discovery, seamen's wages, charter-party, bottomry, and other matters of equity, admiralty, or ecclesiastical law, are, for the most part, of local nature, and requiring prompt interlocutory action of judicial authority; and, therefore, seem to be fit subjects for the original jurisdiction of the consuls, with proper regulations for appeal to the commissioner.

On the other hand, some processes, like mandamus, prohibition, supersedeas, are of so high a nature, that, like review, they seem appropriate to the jurisdiction of the commissioner. The same observation may, perhaps, apply to some processes in equity.

Even as to all these matters, which the statute leaves undetermined, the safer course appears to me to be to adhere, so far as may be, to the spirit of the law, which makes the commissioner the appellate supervisor of the judicial acts of the consuls.

Inquiry has arisen as to whether a vice consul has power to act judicially in China.

It has been supposed that this is a question of the delegation of judicial power by a consular judge. It rather seems to be the question of how a vice consul may be lawfully appointed.

The statute expressly says that "the word *commissioner*, when used in this act, shall be understood to mean the person (in)vested with, and exercising, the principal diplomatic functions in China; and the word *minister* as meaning the person (in)vested with the powers of chief diplomatic functionary of the United States in Turkey. The word *consul* shall be understood to mean any person (in)vested by the United States with, and exercising, the consular authority in any of the five ports of China named in the treaty, or any port in Turkey." (Sec. 23.)

The act then proceeds to say that "all such officers shall be responsible to the United States and to the laws thereof, not as diplomatic functionaries and commercial functionaries, but as judicial officers, *when they perform judicial duties*." (Sec. 24.)

Now, it has never been doubted that the secretary of legation in China, or any other acting chargé d'affaires, could officiate as judge in virtue of treaty and statute.

And as to consuls, what possible significancy has the statute, unless it be that vice consuls may so act, when *duly appointed* by the United States?

In truth, the statute, with great propriety, employs the word *consul* as the *nomen generalissimum* for any person lawfully invested with consular authority.

If, therefore, the vice consul have this power, it will not be authority delegated in the sense of the objection, that is, the case of a judicial consul delegating his judicial authority; but, on the contrary, it is the case of power conferred by the statute.

Moreover, the objection assumes that the vice consul is appointed by the consul. That is an error. The vice consul is in law appointed by the Secretary of the State or the President, just as inspectors of customs are *in law* appointed by the Secretary of the Treasury (or the President). To be sure, the consul in practice frequently nominates a vice consul to the Secretary of State, as the collector of customs nominates an inspector to the Secretary of Treasury. (Mr. Legare's Opinions, March 24, 1843, pp. 1577, 1579; *United States vs. Bachelder*, ii Gallison, p. 15; *United States vs. Wood*, *ibid*, p. 361.) Whether nominated in the first instance by the commissioner or by the consul, the vice consul, when approved by the Secretary of State, is to be deemed a "person (in)vested by the United States with, and exercising, the consular authority." And the approval may, perhaps, be considered as covering the action of the vice consul under his existing appointment by the commissioner.

Suggestion is made of some other matters of doubt in the judicial power of the commissioner and the consuls, which requires us to go back to the treaty, and compare certain of its provisions with those of the statute. These doubtful matters are the three cases specified on a previous page, in which question might arise whether the extritoriality of Americans in China is perfect. It is, in truth, however, in each of those cases, a question, not whether they enjoy extritoriality there so far as that is a privilege or a right, but whether it also attaches to them as an obligation. The laws of their own country accompany them to China, in so far as regards any criminal act whatsoever which they may commit, or be charged with committing, there. The

same laws accompany them, in so far as regards any rights they may possess relatively to any other Americans; and so also in regard to any obligations to which they may be subject, relatively to any other Americans. But, how is it, in China, with regard to the civil rights and duties of Americans there, relatively to persons there not Americans?

As among the nations of Christendom, on their own soil, we know that alien friends may sue and be sued in the courts of any country. An American in France may recover his debt of a Frenchman; a Spaniard in the United States may recover his debt of an American. Is the same thing true, as between persons of either of those nations in China? Is it true there, as between a Chinese and an American?

To begin with the latter case: The treaty stipulates that "if controversies arise (in China) between citizens of the United States and subjects of China, which cannot be amicably settled otherwise, the same shall be examined and decided, conformably to justice and equity, by the public officers of the two nations acting in conjunction." (Art. 24.) The controversy shall be settled, that the treaty engages: it shall be settled conformably to justice and equity, and it shall be settled by some conjoint action of the proper officers of the respective nations. But how?

I think the answer is obvious. Before proceeding to give it, however, it may be well to anticipate objection to what might, at first blush, appear to be an anomaly in jurisprudence. I mean the administration of law among distinct nationalities in the same place or territory, as applied to the state of things in China.

In the middle age, the fact was common, as between

the coexisting nationalities, to give to distinct codes of law a personal application, according to nations, instead of a merely territorial force. (Cathcart's Savigny, vol. i, ch. 3.)

At the present time, we have precisely the same fact before us in British India. Europeans, when they first visited India, found a conqueror and a conquered race living together, with the law of each administered by nationalities. (Jones's Ins. Hind. Law, art. 203.) Each successive European conqueror followed more or less the same rule. (Bowyer's Pub. Law, p. 168.) The doctrine applies not only to civil rights and remedies, but also, in many respects, to crimes. (Morley, Ind. Cases, int. p. 169.) And the system is now sanctioned by the statutes of the imperial government, which enact that a case of controversy between Mohammedans is to be governed by their laws and usages, and a case of controversy between Gentoos by theirs, and where it is controversy between a Mohammedan and a Gentoo, the law of the defendant's nation is to be applied to the case. (Act of Parliament of 21 George iii, c. 70; and of 37 George iii, c. 142. The acts of Parliament speak of *Gentoos* only in addition to Mohammedans. This word is not a name of nationality, but is English corruption of the Portuguese *gentio* (gentile.) Hence, the practical construction of the expression, in the Anglo-Indian courts, is to consider "Gentoo" as comprehending all nationalities in Hindostan except Christians and Moors; and the national law of each is applied with impartiality alike to Hindus, Sikhs, Parsis, and Jews. (The Kojahs' and Memons' case, Perry's Oriental Cases, p. 110, 124.)

In the British colonies proper, as distinguished from

the delusively-called possessions of the East India Company, the rule of public law is, to maintain the municipal institutions of the conquered until they be changed by the conqueror. (Burge's Com., vol. i, p. 31; Clark, Colonial Law, p. 4. See Vattel, Droit des Gens., l. iii, ch. 12, s. 201; Calvin's case, vii Co. R., p. 176; Rex *vs.* Vaughan, vii Bur., p. 2600; Blanchard *vs.* Galdy, ii Salk, p. 411; Brief in U. S. *vs.* Ritchie, p. 5.)

In the United States the doctrine is the same. (Strother *vs.* Lucas, xii Peters, p. 436; Mitchell *vs.* The United States, ix Peters, p. 794.)

But, in the British colonies proper, as well as in the States and organized Territories of the United States, the law is *territorial* in its application and force, not personal,—that is, it applies to all persons, of whatever nation, within the ceded or conquered territory.

It will suffice to elucidate this by examples drawn from our own public law.

The several treaties of cession, by which foreign territory, with its inhabitants, has been transferred to the United States, are those of Louisiana, of the two Floridas, and of New Mexico and California.

Our treaty with France, for the acquisition of Louisiana, stipulates that:

“ART. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and, in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.” (viii Stat. at Large, p. 202.)

Stipulations to the same effect appear in the treaty

with Spain, which transferred to us the Floridas, (Art. v and vi, viii Stat. at Large, p. 356); and that with the Mexican republic, which recognised our conquest of New Mexico and California. (Art. viii, ix Stat. at Large, p. 929.)

In each of these instances, it has been adjudged, as the rule of our public law, and provided by statute, that the laws and usages of the ceded *country*, as they existed at the time of cession, continued to be the law, not only of the previous inhabitants, but of *all others* who should come to reside in it. No distinction of law was maintained in Louisiana, Florida, or California, between the original French or Spanish inhabitants and the immigrant Anglo-Americans. The *civil* law continued to be the law of the country, until it was modified by the legislative act of the *people* of the *Territory*,—that is, the new inchoate state of the American confederation,—that is, its free inhabitants, of whichever nation, acting as a political society. In what is now the State of Louisiana, for instance, the Roman, Spanish, and French laws, modified by statutes, continued to be the system of the State. (Louis. Code, art. 36, 21.) In the Territory, now State, of Missouri, when the Anglo-Americans had come to predominate in numbers, the common law was substituted for the civil, as the fundamental body of jurisprudence. (Acts of 1816 and 1825. See Brief, Ruggles *vs.* Comtesse de Tournon, p. 38.) The same thing was done by the State of California. (Act. of 1850.) Thus, in each organized Territory or State of the Union, there is but *one municipal code*, so far as regards all the inhabitants of the Territory or State.

Nevertheless, we have, in territory of the United

States unorganized, the example of law administered by nationalities in the case of the subject Indians, more especially the Choctaws, Chickasaws, and Cherokees. (Opinion, May 23, 1855. MS.)

Nay, we have a striking example of the same thing, in substantial effect, in the administration of law as applied to the citizens of the United States.

Every such citizen, save in the District of Columbia, is a citizen of some State, or of a Territory, hereafter to become a State. But, in respect of all matters of municipal resort, the several States are in the relation to one another of foreign governments. That is to say, their citizens constitute in many respects distinct and independent nationalities.

In Pennsylvania, for instance, a citizen of Virginia sues, or, if there, may be sued, either in relation to a citizen of Pennsylvania, or even to another quasi-foreigner, such as a citizen of Massachusetts: all, in Pennsylvania, being thus subject to the laws and the tribunals of Pennsylvania. But, if the subject-matter be one of federal law, that, and not the law of the State, is to be applied to the case.

Moreover, each citizen of a State has open to him the federal courts in a controversy between himself and a citizen of another State, either by the transfer of his case, or by original suit in the courts of the United States. But, in that event, he must go into the federal courts for the State of the *defendant*, and, unless it be a question of federal rights, he must accept as the rule of decision the municipal law of that State.

I apply these doctrines of public law to citizens of the United States in their relations to persons of other nations in China.

First, as to a demand brought by a Chinese against an American: The statute provides that the consular court shall have jurisdiction of "all civil cases arising under said treaty." (Sec. 3 and 11.) The controversy supposed is a civil case arising under the treaty. When it arises, "the proper officers of the two nations" will agree that the Chinese shall go into the consular court as plaintiff, and that court will take jurisdiction of the defendant as an American. Or they may enter into a general agreement, and the commissioner may provide, by a standing regulation under the statute, that the consular court shall hear and determine all private claims which Chinese may prefer against Americans.

Confirmatory of this conclusion, as also of what is hereafter to be said of the case of controversy between Americans and foreigners in China, there is in the statute a very significant expression, which assumes that the consular courts are to administer justice in some cases not confined to citizens of the United States. It extends the law, which it prescribes, to citizens of the United States, and to "*all others*, to the extent that the terms of the treaty justify or require." (Sec. 34.) Among those "others" are subjects of China and of any government, who, by voluntarily making themselves parties complainant or demandant before the consular court, appeal, *pro tanto*, to the laws of the United States.

Secondly, as to a demand by an American against a Chinese: The former must, of necessity, be content with such judicial or executive action of the Chinese government in the premises, as appertains to their institutions, and as, by special application in each case,

or by general application, may be required on the part of the public officers of the United States.

As to the other case, that of controversies occurring in China between citizens of the United States and subjects of any other (Christian) government, the treaty provides that the same "shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China." (Art. xxv.)

Now, we have no *special* treaty with any of those governments on this point; nor is any needed, or necessarily required or intended by the stipulation under consideration. With all, we have treaties of amity, or of ordinary commercial and social intercourse; and that suffices to meet the exigency.

By the tenor of those treaties, as they are construed by the law and usage of nations, an Englishman has the right to sue a resident American, or an American a resident Englishman, as alien friend, in all places wherever, respectively, the jurisdiction of the other country exists locally, and is complete as to subject-matter, persons, and remedial forms. (Fœlix, Dr. Intern. privé, tit. xi, ch. 2.)

The jurisdiction of the United States is complete as to their citizens in China; and the jurisdiction of Great Britain is complete as to her subjects in China. That the jurisdiction, in each case, is extraterritorial, that in China it is excepted from the local territoriality, and that it is outside of the territoriality of either Great Britain or the United States, is a fact wholly immaterial to the question. It is a question free of all doubt on principles of international right, and subject only to the single inquiry, whether the given country, each

proceeding in established legal forms, by whatsoever authority such forms be established, has conferred on its courts of justice in China jurisdiction *ad hoc*, or whether that remains to be done.

Here, again, the statute is explicit and ample. It confers on the consular courts jurisdiction of "all civil cases arising under said treaty." A demand of an Englishman against an American is a civil case arising under the treaty, as we see.

Therefore, a suit may be brought by the Englishman against the American in the consular court of the United States; as, undoubtedly, in the consular court of Great Britain, it may, consistently with public law, be brought by an American against an Englishman.

If the Englishman were within the territorial jurisdiction of the United States, he might sue, but would also be subject to suit, in the local courts, as the American might and would be in England. (Fœlix, *ubi supra*.) Nay, a suit would lie in the courts of Great Britain or the United States, between residents, both being aliens in the country. (Fœlix, *ubi supra*.)

In China, the relative condition of all these persons differs in this, that the local courts of each government, being extraterritorial ones, have no territorial jurisdiction, but only a jurisdiction as respects persons, namely, its own citizens or subjects. Of course, neither government can take compulsory jurisdiction there of a subject or citizen of any other; but each may act compulsorily upon its own, at the suit of that of another.

Perhaps neither government is under perfect obligation to do this; but it may do so in obedience to national comity; it can rightfully do so if it will; and its obligation to do so will be perfect, provided the

exercise of the right be reciprocated by the other government.

One other, and a more difficult, question remains to be explored, namely, whether a foreign government can pursue a citizen of the United States for debt or damage before the consuls' court in China. I put the question in the most general form, for so, in truth, it needs to be considered, although it presents itself, in your communication, as a special question of an assumed or suggested right of the government of China to sue for duties on imports or exports due, or claimed to be due, from citizens of the United States.

Here, within the territorial limits of the United States, beyond all peradventure, the Great Khan may, *for good and lawful cause*, bring suit in some proper court against a citizen of the United States.

In England, it has been held from the earliest times that a foreign prince or government may appear and prosecute suit before the courts of the realm, either at law or in equity (Calvin's case, vii Co. R., p. 30, citing xi Edw. iii.)

The King of Spain has been several times a suitor in the courts of England. (*Roi d'Espagne vs. Pountes*, Rolle's Abr. tit. Court d'Adm., E. 5; *Spanish Ambassador vs. Pountes*, i Rolle's R., p. 133; *King of Spain vs. Hallett*, i Clk. and F., p. 333, and vii Bligh, 559; *King of Spain vs. Tacon*, iv Russ., 225; *King of Spain vs. Machado*, ibid., p. 560; *King of Spain vs. Mendizabel*, cited in *Col. Gov. vs. Rothschild*, i Sim., p. 101. See also *Hallett and King of Spain*, ii Bligh, N. S. p. 31.)

The Queen of Portugal has appeared occasionally. (*Queen of Portugal vs. Glyn*, vii Clk. and F., p. 466. See also *Glyn vs. Queen of Portugal*, i Younge & C., p. 644.)

The King of Hanover has also been a party both plaintiff and defendant. (King of Hanover *vs.* Wheatly, iv Bev., p. 78; Duke of Brunswick *vs.* King of Hanover, vi Bev., p. 1.) The Republic of Columbia has been a complainant before the Vice Chancellor. (iSim., p. 94.)

To the same effect is the doctrine of the United States. In Pennsylvania we have had the case of the King of France *vs.* Morris. (Referred to in Peter *vs.* Steel, iii Yeates, 250, 251.) In New York we have the recent case of the Republic of Mexico *vs.* Arrangoiz. (MS.) The King of Spain has appeared in the circuit court of the United States. (King of Spain *vs.* Oliver, ii Wash. C. C. R., 429.) The King of Prussia has been plaintiff in the State of Missouri. (MS.) One of the cases above cited is particularly interesting, because it is a suit by the King of Spain against a citizen of the United States for duties on imports into the port of Vera Cruz. This appears by the charge of the court on the trial of the case. In that charge, it is not intimated that the King of Spain might not well sue in our courts for duties: and the answer of the defendant consisted of other matters; such as, that the duties were not due from this defendant, but from another party; and that they had in fact been paid or adjusted in account by that other party. (King of Spain *vs.* Oliver, i Peters' C. C. R., p. 276. See also *ibid.*, p. 217.)

While, on its face, this case goes to show that a foreign government may sue in the United States for duties, yet such conclusion must be taken with the reservation that it was a case at *nisi prius*. It is open to very serious objections, as applied to the case of a suit by the Chinese government for *duties*. That is to say, our courts are free to foreign sovereigns for many

purposes; but *non constat* that they are in all cases. And, among the questionable matters, are things of *political* obligation, as distinguished from municipal engagement. (Nabob of Carnatic *vs.* East India Company, i Ves., pp. 371, 388; ii Ves., p. 56.) This consideration may or may not be material to the present inquiry. At any rate, it suggests reflection as to the bearing of the treaty upon the question.

I perceive, on referring to the treaty with China, not a single word, which implies that the judicial authorities of the United States there may entertain the suit of a government or sovereign. The treaty mentions explicitly "the subjects of China" and "the subjects of other governments," and "subjects" alone, as the parties to legal controversy, in which the public officers of the United States are to intervene. But the statute, as we have already seen, is but co-extensive with the treaty, and confers jurisdiction of those controversies, whatever they may be, which the treaty contemplates as the object of legal adjudication, and no others. Of course, as it would seem, the consular courts cannot entertain a suit by the government of China.

There is another class of considerations, which is conclusive. It is, that the treaty makes full provision as to the mode of assessing duties, and the means of securing their payment; and the provision on these points consists of political engagement. The consul of the United States is to adjust all disputes of appraisement with the Chinese superintendent of customs. (Art. xi.) That is political, not judicial, action. So, without payment of duties, the superintendent refuses to deliver a clearance, and the consul withholds the ship's papers. (Art. xxiii.) That is political action on

both sides. And it is preventive action, and, therefore, better than remedial. The government of the United States engages to the government of China, that, until the duties be adjusted, no ship shall receive her papers; and the consul sees to this on the part, and as the officer, of the United States.

I do not mean to say that the treaty might not have stipulated a purely judicial remedy in these cases. I merely say that, in my opinion, it has not done this. It has provided other remedies, such as the high contracting parties at the time saw fit to agree to by sovereign convention. If it be desirable on either side to change the provision of the treaty in that respect, and to open the consular courts to the Chinese government for the collection of duties, and to that and all other governments, as courts within the United States are, an opportunity will be afforded during the next year, when, by the terms of the treaty, it becomes subject to revision and amendment. (Art. xxxiv.) But whether any such change be expedient or not, is a diplomatic question, for the determination of the President.

The act of Congress, herein commented on, is a most important and valuable one. It made provision, however, for a discription of cases, new, in form at least, to the legislation of the United States, and subject, of course, to such amendment as time and experience might show to be desirable. I beg leave to call your attention to the instructive suggestions on this point, which occur in one of Mr. Marshall's despatches. (Mr. Marshall to Mr. Marcy, December 8, 1853, (B), Ex. Docs., *ubi supra*, p. 331.)

Permit me to observe, in conclusion, that the trans-

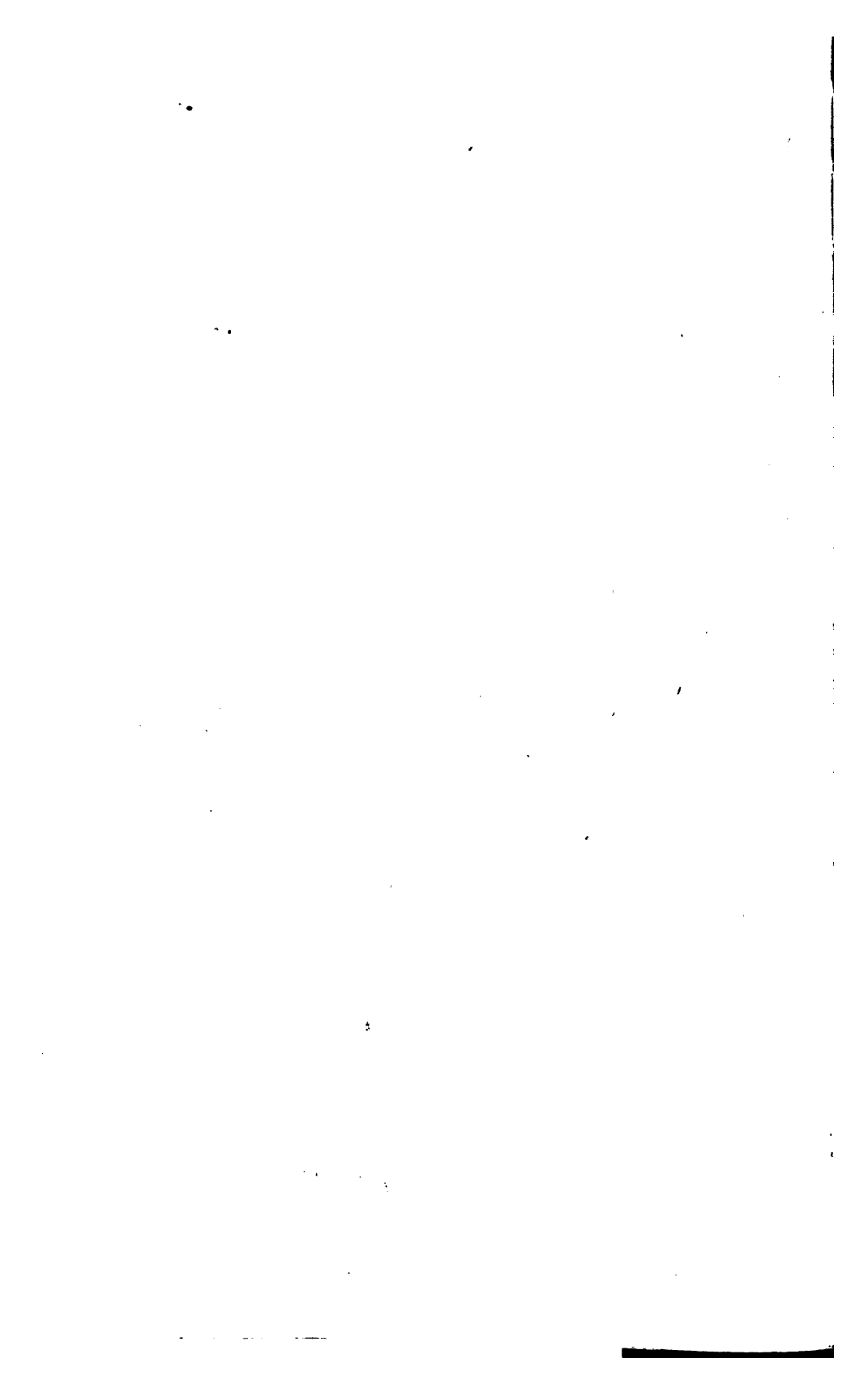
action, referred to in your note, in respect to duties claimed of citizens at Shanghai, was not judicial in their nature, either in form or in substance. It was a decision by the commissioner. There could be no judicial decision by the commissioner, except on appeal from the consular court at Shanghai. In that court, to constitute the ground-work of action by the commissioner, there must have been a trial and decision by the consul, with dissenting opinions of his assessors, certified in due course to the commissioner. None of these things appear. On the contrary, it is clear that the commissioner decided the question in his political or individual character as arbitrator between the Chinese government and the particular citizens of the United States, and the decision has validity as an arbitral award of his, not as a judicial decision of the consular court of Shanghai. (Mr. McLane to Mr. Marcy, Nov. 25th, 1854, and exhibits, especially, Exh. F., MS. State Dept.)

I have the honor to be, very respectfully,

C. CUSHING.

Hon. W. L. MARCY,
Secretary of State.

Ed W. 2/6/58



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